

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRAVIS LEE DAVIS-ROWLAND,

Defendant-Appellant.

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UNPUBLISHED

April 16, 2015

No. 320731

Ingham Circuit Court

LC No. 13-000579-FH

Before: O'CONNELL, P.J., and FORT HOOD and GADOLA, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84. The trial court sentenced defendant as a habitual offender, fourth offense, MCL 769.12, to 42 to 180 months' imprisonment. Defendant appeals as of right. We affirm.

I. BACKGROUND

On May 21, 2013, Amber Fountain, Bradley Blevins, Anna Karpinski, Xavier Claudio, Cristobel Claudio, and defendant were at Karpinski's second-story apartment playing card games. Fountain testified that defendant became upset with her over the rules of a game and the two began arguing. A short time later, Karpinski and Fountain asked defendant to leave. According to Xavier, as defendant left he told Fountain, "Wait until you come outside." Fountain then reopened the door. Karpinski testified that she saw Fountain put one foot outside the door and then heard her fall quickly down the stairs outside of the apartment. Xavier testified that he saw Fountain step onto the small landing, saw her lean back as if to avoid getting grabbed, and then saw her being yanked forward, although he did not see defendant's hands. Cristobel testified that he saw Fountain step out of the apartment and then lean back against a tug on her body before he heard her fall down the stairs. Fountain testified that she remembered feeling her hair being pulled, hitting her head on the first roll down the stairs, and then waking up in the hospital. As a result of the fall, Fountain sustained lacerations to her head, a concussion, a subdermal hematoma, and a fractured skull near the base of her spine.

II. DISCUSSION

A. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the evidence was insufficient to support his conviction of assault with intent to do great bodily harm because none of the witnesses saw him pull Fountain

down the stairs. We review de novo a challenge to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). In reviewing a sufficiency claim, we view the evidence in a light most favorable to the prosecution and consider whether a rational trier of fact could find that the defendant committed the crime charged beyond a reasonable doubt. *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010). Circumstantial evidence, and the reasonable inferences arising from it, may be sufficient to support a conviction beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 429; 646 NW2d 158 (2002).

Although no witnesses directly observed defendant pull Fountain down the stairs, a rational jury could find that he did so on the basis of the evidence presented. Witnesses testified that they heard defendant tell Fountain, “Wait until you come outside,” following an argument. Defendant argues that Fountain could have simply fallen down the stairs because she was intoxicated. However, Xavier and Cristobel both testified that Fountain resisted an apparent tug and leaned backwards before she fell down the stairs. Fountain testified that she remembered someone pulling her hair before rolling down the stairs. Karpinski, Xavier, and Cristobel all testified that they saw defendant run from the scene while Fountain’s body was lying at the bottom of the stairs.

Defendant argues that the prosecutor had to prove two theories because Fountain testified that she was pulled back by her hair while Xavier and Cristobel testified that Fountain was pulled forwards. Regardless of the direction of the pull, the evidence was sufficient to demonstrate that defendant’s actions initiated Fountain’s fall. Because a rational jury could reasonably infer from the evidence presented that defendant intended to cause Fountain great bodily harm, and that his actions caused her injuries, the evidence was sufficient to support his conviction.

## B. EVIDENTIARY ISSUES

### 1. DEFENDANT’S RESPONSE TO POLICE INVESTIGATION

Defendant claims that the lower court improperly admitted evidence of his lack of cooperation with a police investigation before his arrest. Specifically, defendant argues that his silence during the police investigation was not admissible as a tacit admission or adoption following an accusation. Defendant did not object to the introduction of this evidence at trial, so our review is limited to plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Relevant evidence is generally admissible. MRE 402; *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003). Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. A defendant’s silence following an accusation is inadmissible as a tacit adoption or admission under the hearsay exception, MRE 801(d)(2)(B), “unless the defendant has manifested his adoption or belief in its truth.” *People v Solmonson*, 261 Mich App 657, 664-665; 683 NW2d 761 (2004). However, evidence of demeanor and nonresponsive statements or conduct during a police investigation is admissible to demonstrate a consciousness of guilt. *Id.* at 666-667.

In this case, the police came to defendant’s house and knocked on his door, but defendant refused to open the door, instead sticking his head out of an upper level window. Defendant

refused to answer when the police asked if his name was Travis Davis-Rowland. Officers told defendant they were investigating an assault, and defendant responded by stating, “Well, what if I was Travis Rowland?” and, “What if I was involved in an assault?” The police left when they determined defendant was uncooperative. MRE 801(d)(2)(B) was not implicated here because, during the police investigation, defendant was not accused of assaulting Fountain and did not manifest an adoption of the truth of the officers’ questions. The prosecutor did not attempt to use defendant’s silence against him, but rather emphasized his uncooperative conduct and statements. Evidence of defendant’s lack of cooperation with the police was relevant to demonstrate his consciousness of guilt. *Solmonson*, 261 Mich App at 666-667. Moreover, the evidence was not unfairly prejudicial because it pertained directly to defendant’s guilt or innocence and was damaging only to the extent that it genuinely illustrated defendant’s response to the police investigation of the assault. See *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005). Accordingly, the trial court did not plainly err in admitting the evidence.

## 2. TESTIMONY OF LAURIE BLEVINS

Defendant next argues that the trial court erred in allowing Laurie Blevins to testify when she was not included on the prosecution’s witness list. We review a trial court’s decision to allow or deny the late endorsement of a witness for an abuse of discretion. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

Under MCL 767.40a(1) and (2), a prosecutor must attach to the information a list of all known witnesses who might be called at trial and must disclose any additional res gestate witnesses as they become known. At least thirty days before trial, the prosecutor must provide the defendant with a list of the witnesses the prosecutor intends to produce at trial. At any time, a trial court may grant leave to amend witness list for good cause shown. *People v Callon*, 256 Mich App 312, 326; 662 NW2d 501 (2003). Moreover, the “[m]ere negligence of the prosecutor [that violates MCL 767.40a] is not the type of egregious case for which the extreme sanction of precluding relevant evidence is reserved.” *Id.* at 328.

Although the prosecutor improperly excluded Laurie Blevins from the witness list in violation of MCL 767.40a, the error was not so egregious as to preclude Blevins’s relevant testimony at trial. The police report stated that Bradley Blevins was present and heard defendant apologize to Laurie Blevins for his part in Fountain’s assault. However, at trial, Bradley testified that he was not present when defendant apologized. Given that the prosecutor reasonably anticipated that evidence of the apology would come in through Bradley’s testimony, and was taken by surprise when his testimony was inconsistent with the police report, the court did not abuse its discretion in finding good cause existed for the late endorsement of Laurie Blevins.

## C. JURY INSTRUCTIONS

In his Standard 4 brief, defendant argues that the trial court improperly instructed the jury. Defendant did not object to the instructions at trial, so our review is limited to plain error affecting defendant’s substantial rights. *Carines*, 460 Mich at 766-767. We review jury instructions in their entirety to determine whether there was an error requiring reversal. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). A criminal defendant has the right to have a properly instructed jury consider the evidence against him. *People v Mills*, 450 Mich 61,

80; 537 NW2d 909 (1995). No error exists if the instructions fairly presented the issues for trial and sufficiently protected the defendant's rights. *McFall*, 224 Mich App at 412-413.

Defendant first argues that the trial court should have informed the jury that it had the discretion to allow them to ask questions of the witnesses. Although a trial court may permit jurors to ask questions of witnesses, that decision is within the trial court's sound discretion. *People v Heard*, 388 Mich 182, 187-188; 200 NW2d 73 (1972). Because the court was not required to allow jurors to ask questions, failing to inform the jury of that possibility was not plain error.

Defendant contends that the trial court confused the jury when jurors asked to see a copy of the police report. The trial court properly instructed the jury that the police report was not admitted into evidence, and the jury could only consider evidence presented at trial. See *People v Davis*, 216 Mich App 47, 57; 459 NW2d 1 (1996). No error occurred here. Moreover, defendant's attorney expressly agreed to this response, thus waiving any error. *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011).

Defendant argues that the trial court erred in not providing a self-defense instruction. In order to instruct a jury on a particular theory of the case, the evidence presented at trial must support the theory. *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988). At trial, defendant did not present a self-defense theory, but instead argued that Fountain was injured because she was intoxicated and upset, and that no one saw a physical altercation. Because evidence supporting a self-defense theory was not presented at trial, the trial court's decision to exclude a self-defense jury instruction was not erroneous. Additionally, defense counsel explicitly approved the instructions, waiving any error. *Kowalski*, 489 Mich at 503.

Finally, defendant asserts that the trial court's instruction regarding attorney statements created a presumption that the prosecutor would not misrepresent evidence or mislead the jury. Defendant claims that the jury gave undue weight to the prosecutor's closing argument because the trial court did not instruct the jury that the prosecutor's statements were not evidence until after the argument was given. Defendant's claim lacks merit. The court properly instructed the jury that the statements and arguments of the attorneys were not evidence. *People v Unger*, 278 Mich App 210, 240-241; 749 NW2d 272 (2008). We presume that jurors follow any instructions provided. *Id.* at 235. Therefore, we conclude that no plain error occurred.

#### D. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor's misconduct deprived him of a fair trial. We review claims of prosecutorial misconduct on a case-by-case basis to determine whether a defendant was denied a fair trial. *People v Fyda*, 288 Mich App 446, 460; 793 NW2d 712 (2010). Prosecutors are free to argue the evidence and all reasonable inferences arising from it as it relates to their theory of the case. *Unger*, 278 Mich App at 236.

Defendant argues that the prosecutor's closing argument was unsupported by the evidence. Defendant suggests that the prosecutor's statement that Fountain recalled hitting her head on the rail as she fell down the stairs was improper. Yet, this statement was supported by Fountain's testimony that she hit her head during her first roll down the stairs and that she then

went unconscious. Defendant argues that the prosecutor's statement that the witnesses saw Fountain lying on the ground on her back and bleeding from the head was not supported by the evidence. However, Karpinski testified that she saw Fountain on her back at the bottom of the steps bleeding from the head, and Xavier testified that Fountain's head was bleeding as she tried to sit up. Defendant argues that the prosecutor improperly commented that defendant admitted to Laurie Blevins that he put his hands on Fountain, but Laurie Blevins testified to this fact. Defendant argues that the prosecutor improperly speculated that Fountain's injuries were consistent with the prosecution's theory that Fountain was pulled down the stairs while her hands were up by her hair. A prosecutor is free to argue his theory of the case using all reasonable inferences arising from the evidence. *Unger*, 278 Mich App at 236. Accordingly, we discern no error in the prosecutor's closing statements.

Defendant also claims that the prosecutor improperly suppressed evidence that Fountain was required to undergo drug testing because of her involvement with Child Protective Services. This evidence was not relevant because it had no bearing on defendant's guilt or innocence and did not implicate Fountain's credibility as a witness. MRE 401. The prosecutor did not err in refusing to produce this evidence at trial.

#### E. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant contends that his trial counsel provided ineffective assistance. Claims of ineffective assistance present mixed questions of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's factual findings for clear error and review constitutional issues de novo. *Id.* To establish a claim of ineffective assistance of counsel a defendant must show (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense. *People v Taylor*, 275 Mich App 177, 186; 737 NW2d 790 (2007). An attorney's performance is deficient if it fell below an objective standard of professional reasonableness. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). The performance will be deemed to have prejudiced the defense if it is reasonably probable that, but for counsel's errors, the result of the proceeding would have been different. *Id.* Effective assistance is presumed and the defendant bears the heavy burden of proving otherwise. *LeBlanc*, 465 Mich at 578.

Defendant argues that his attorney's performance was deficient because he did not object to the jury instructions and the prosecutor's closing remarks. However, defendant has failed to show that the jury instructions or the prosecutor's closing comments were improper. "Counsel is not ineffective for failing to make a futile objection." *In re Archer*, 277 Mich App 71, 84; 744 NW2d 1 (2007).

Defendant claims that his attorney was unprepared for testimony that Xavier and Claudio saw Fountain struggling against a pull and saw the back half of her body before she fell. To overcome the presumption of sound trial strategy, a defendant must show that his attorney's failure to prepare for witness testimony resulted in ignorance of evidence that would have substantially benefitted the defense. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). At trial, defendant's attorney elicited testimony that none of the witnesses saw defendant's hands, and argued to the jury that the witnesses were each in a position where if

physical contact had occurred between Fountain and defendant, the witnesses would have been able to see it. Defendant has not demonstrated that his trial counsel was unprepared.

Affirmed.

/s/ Peter D. O'Connell  
/s/ Karen M. Fort Hood  
/s/ Michael F. Gadola